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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-822

THE RENEGOTIATION BOARD,
Petitioner,

vs.

BANNERCRAFT CLOTHING COMPANY, INC., ASTRO COMMUNICATION LABORATORY, A DIVISION OF AIKEN INDUSTRIES, INC., DAVID G. LILLY CO., INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF SEARS, ROEBUCK AND CO. AND BRIEF AMICUS CURIAE ON BEHALF OF SEARS, ROEBUCK AND CO.

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Sears, Roebuck and Co. respectfully moves for leave to file a brief, as *amicus curiae,* in support of the petition for certiorari filed in this case by the Solicitor General. In support of this motion, Sears states:

1. Sears was recently the moving party in another action which involved a closely related situation. In *Sears, Roebuck and Co.* v. *N. L. R. B.,* ..... F. 2d ....., 81 LRRM 2481 (D. C. Cir. Oct 24, 1972), *pet. reh. pend.,* the District of Columbia Court of Appeals, after finding jurisdiction on the basis of its decision in the instant case, held that there was an insufficient showing of irreparable harm, notwithstanding the failure to provide public documents under the Freedom of Information Act, 5 U. S. C. § 551 *et seq.,* to warrant enjoining pending National Labor Relations Board proceedings. In effect, the court, in contrast to the Solicitor General's assertion in the instant petition

(p. 9) that Renegotiation Board and N. L. R. B. proceedings are identical for purposes of the issues here involved, carved out an exception to its decision in the present case for Labor Board matters; the irreparable harm determination in Sears is a virtually insurmountable barrier to forestalling determinative N. L. R. B. action until relevant information, which is required to be made available under the Act, is provided. If Sears is granted leave to file a brief, it will seek to show why, in order to resolve all aspects of the question here presented, this Court should determine the present case in conjunction with *Sears*.

2. Sears was also the plaintiff—the party seeking documents from the government under the Freedom of Information Act—in *Sears, Roebuck and Co.* v. *N. L. R. B.*, 433 F. 2d 210 (6th Cir. 1970). The Solicitor General has asserted that the Sixth Circuit's opinion in that case directly conflicts with the decision below in the present case. Pet. for Cert., pp. 8-9. If Sears is granted leave to file a brief, it will seek to show why, although it disagrees with this asserted conflict, the issue presented in both cases is nevertheless one which warrants review by this Court.

For the foregoing reasons, Sears respectfully requests leave to present its views.

Respectfully submitted,

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This brief *amicus curiae* is filed on behalf of Sears, Roebuck and Co. contingent upon the Court's granting the foregoing motion for leave to file a brief *amicus curiae.*

INTEREST OF THE AMICUS CURIAE.

The interest of Sears is set forth in its annexed motion for leave to file a brief *amicus curiae.*

REASONS FOR GRANTING THE WRIT.

1. Sears agrees with the Solicitor General that the question here presented is an important one which warrants review by this Court. The Freedom of Information Act was intended, through a "liberal disclosure requirement," to "increase the citizen's access to government records."[1] Both the failure to provide access at a meaningful date, as well as the failure to provide access altogether, may frustrate this objective. Proceedings under the Act, accordingly, are required to be "expedited in every way." 5 U. S. C. § 552(a)(3). Nevertheless, one of the major impediments to "the efficient operation" of the Act has been "foot-dragging" and "delay" on the part of administrative agencies.[2] This was the problem the court below confronted in the instant case. It recognized that, in the normal instance where an agency is required to make information available, it will do so with reasonable dispatch. Where, however, as the result of a dispute over the Act's coverage or for other reasons, information is not made promptly available, since such information is "likely to be a perishible commodity", any significant delay "may result in substantive damage to the plaintiff's case" and render the information sought "totally useless."[3] Even where this result occurs, there is, of course, no automatic right to equitable relief. There must always be a careful balancing of all interests. The only issue here involved,

1. See, e.g., *Getman* v. *N. L. R. B.*, 450 F. 2d 670, 672 (D. C. Cir. 1971); *Tennessean Newspapers, Inc.* v. *Federal Housing Admin.*, 464 F. 2d 657 (6th Cir. 1972); *Bristol-Myers Company* v. *F. T. C.*, 424 F. 2d 935, 938 (D. C. Cir. 1970), *cert. den.*, 400 U. S. 824 (1970); and *Hawkes* v. *I. R. S.*, 467 F. 2d 787, 791 (6th Cir. 1972).

2. *Administration of the Freedom of Information Act*, H. R. Rep. No. 92-1419, 92d Cong. 2d Sess. (Sept. 20, 1972), pp. 10, 74 and 82-3.

3. *Id.* at 74.

however, is whether, where there has been the requisite showing of irreparable injury, probable success on the merits and absence of countervailing considerations, a district court may then invoke its power to issue all writs necessary to effectuate its jurisdiction[4] to achieve a " 'common sense solution' . . . to 'do complete justice . . .' " *Morrow* v. *District of Columbia*, 417 F. 2d 728, 738 (D. C. Cir. 1969). In order to avoid a severe dislocation in the effectuation of the purposes of the Freedom of Information Act, it is submitted, this Court should affirm that the federal judiciary does, in fact, have this equitable authority.

2. The Sixth Circuit's decision in *Sears, Roebuck and Co.* v. *N. L. R. B.*, 433 F. 2d 210 (6th Cir. 1970), is not to the contrary. In that case, the court found that "the form of relief which the plaintiff seeks would result in early judicial review of a Board decision on permissible discovery, not an order to produce records." 433 F. 2d at 211. The instant case, by contrast, does not involve any attempt to review administrative decisional processes. Similarly, in *Sears, Roebuck and Co.* v. *N. L. R. B.*, ____ F. 2d ____, 81 LRRM 2481 (D. C. Cir. Oct. 24, 1972), *pet. reh. pend.*, where the issue was whether N. L. R. B. proceedings should be enjoined until the Board disclosed information sought by a charging party to permit his more effective participation in his own pending unfair labor practice case, there was no effort to obtain an appellate ruling as to the merits of any ruling by the Board. The issue in both instances was limited to the obligation to provide information under the Freedom of Information Act; enjoining administrative processes was only a necessary ancillary means to permit that question to be resolved in a meaning-

4. See, e.g., the authorities noted by the court below at App. A of the Petition, pp. 14a-15a; *Eastern Greyhound Lines* v. *Fusco*, 310 F. 2d 632, 634 (6th Cir. 1962); *Morrow* v. *District of Columbia*, 417 F. 2d 728, 737-738 (D. C. Cir. 1969); and *Nader* v. *Volpe*, 466 F. 2d 261, 269 (D. C. Cir. 1972) and the cases therein at n. 54.

ful context. In such a case, it is submitted, the controlling precedent is *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557 (1919), where district courts were held to have jurisdiction to restrain agency action where, *inter alia*, there is "no *effective* way of presenting the claim of invalidity at a later date." (emphasis added.) See also *Jewel Companies, Inc.* v. *F. T. C.*, 432 F. 2d 1155 (7th Cir. 1970).

3. The present Sears case presents an important aspect of the jurisdictional issue raised in *Bannercraft:* what showing of irreparable injury to a plaintiff is required under the Freedom of Information Act to warrant enjoining administrative proceedings. If the standard is that of the traditional injunction case, the impact of the present case will be severely restricted. The denial of the right to prompt disclosure must, as a matter of law, be deemed to constitute an irreparable injury. In such a situation, where there is no countervailing harm to other interests, issuance of a preliminary injunction is the appropriate and, in fact, the only means available to enforce a significant statutory right. Cf. *Gomez* v. *Florida State Employment Service*, 417 F. 2d 569 (5th Cir. 1969). The irreparable harm issue in *Sears*, in short, is, in view of the acknowledged absence of material difference between Renegotiation Board and N. L. R. B. proceedings (*pet. for cert.*, p. 9), inseparable from the *Bannercraft* jurisdictional issue. It is for this reason that, in the event its request for rehearing is denied, Sears intends to seek certiorari from this Court and will also move to consolidate that petition with the instant petition. It is for that reason also, as well as to afford the Court with a desirable vehicle to consider all aspects of the question presented, that Sears respectfully suggests that consideration of the instant petition be deferred until such time as the District of Columbia Court of Appeals resolves the request for rehearing in *Sears* and,

should that decision be adverse, there is an opportunity to submit a petition for certiorari therefrom. See *Red Lion Broadcasting Co.* v. *F. C. C.*, 390 U. S. 916 (1968).

CONCLUSION.

For each of the foregoing reasons Sears respectfully requests that this Court grant the Petition for Certiorari or, in the alternative, defer consideration of the instant petition pending resolution of Sears' Petition for Rehearing before the District of Columbia Court of Appeals in *Sears, Roebuck and Co.*, v. *N. L. R. B.*, *supra*.

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